U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 13 August 2003

BALCA Case No.: 2002-INA-00165
ETA Case No.: P2000-CA-09494789/ET

In the Matter of:

LE'S GARDENING & LANDSCAPING,
Employer,

on behalf of

JUAN MADRIGAL-CHAVEZ,
Alien.

Appearance: Leonard W. Stitz
Santa Ana, California

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification on behalf of Juan Madrigal-Chavez ("Alien") filed by Le's Gardening and Landscaping ("Employer") for the position of Landscape Gardener.[1] (AF 28).[2] The following decision is based on the record upon which the Certifying Officer (CO) denied certification (AF 1-82) and Employer's *Statement of Position*, filed May 20, 2002.

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[1]Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2]In this decision, AF is an abbreviation for Appeal File.

STATEMENT OF THE CASE

On December 18, 1997, Employer filed an application for alien employment certification on behalf of the Alien for the position of Landscape Gardener. (AF 28-33). On November 20, 2001, the CO issued a Notice of Finding (NOF) stating the Department's intention to deny the application for two reasons: 1) it is questionable whether a current job opening exists, or whether there is a current business operated by the employer; and 2) Employer did not submit documentation to establish that it has funds available to pay the wage or salary offered to the Alien. (AF 10-12).

With regard to the Department's first ground for denial of application, the CO determined that Employer did not comport with the definition of "Employer" found at 20 C.F.R. § 656.3. (AF 11). The CO determined that the Employer in this case could not be considered an on-going business in which an unfilled job opening currently exists because Employer failed to submit a copy of a current California State contractor's license with its application for labor certification.

With regard to the Department's second ground for denial of application, the CO determined that Employer did not comply with 20 C.F.R. § 656.20(c)(1), which requires an employer to have enough funds available to pay the wage or salary offered to the alien. (AF 11). The CO noted that Employer's 1997 tax returns that were submitted with the application showed that Employer's net profit for 1997 was $17,946.00. (AF 42-50). The CO also noted that the instant job offer indicated that there were two positions open for a Landscape Gardener. Based on the hourly wage of $10.42, which was offered for a position as a Landscape gardener, the CO calculated that the hourly wage would equate to $21,673.60 per year ($10.42 x 2080 hours). Therefore, the CO determined that the total wages offered for the two positions would be $43,347.20 per year. The CO concluded that the documentation submitted by Employer did not support the statement that was signed by Employer on the ETA form 750, that Employer has enough funds available to pay the wage or salary offered to the Alien.

The NOF provided remedial steps that Employer could take to correct and/or rebut both grounds for denial found by the CO. (AF 11). The NOF also stated that Employer had until December 25, 2001, to rebut the findings or to remedy the defects, otherwise the NOF would become the final decision of the Secretary denying labor certification. (AF 10).

Employer requested an extension of time to prepare a response to the NOF. (AF 7). The CO granted Employer's request for an extension of time. (AF 9). Employer's response to the NOF was received on January 24, 2002. (AF 13). Enclosed with Employer's rebuttal letter was a copy of Employer's tax returns for the year 2000 (AF 17-24) and a copy of Employer's business license issued by the City of Irvine. (AF 25).

The Final Determination denying certification was issued on February 20, 2002. (AF 5-6). The CO determined that the rebuttal letter submitted by Employer was non-responsive to the NOF, but instead addressed the issue of reasonableness of Employer's recruitment efforts. (AF 6). After consideration of the other evidence submitted with the rebuttal letter, the CO determined that Employer remained in violation on both counts referenced in the NOF. The CO reasoned that Employer failed to provide a contractor's license issued by the State of California, as requested. Furthermore, the CO determined that the net profits listed on the 2000 tax return, in the amount of $18,362.00, indicated that Employer would not be able to support the wage offered.

Employer filed a Request for Review of the Denial of Certification on March 15, 2002. (AF 1). Employer bases its appeal on the following two reasons: 1) Employer maintains an existing business which offers a job opening; and 2) Employer has the financial ability to pay the proffered wage. (AF 1).

DISCUSSION

A. Whether Employer Maintains an Existing Business Which Offers a Job Opening

An employer must be "a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation." 20 C.F.R. § 656.3. Upon a request by the CO, a petitioner must provide a business license or other documentation to prove the existence of an on-going business and job opening. *Kogan & Moore Architects, Inc.*, 1990-INA-466 (May 10, 1991). If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (en banc). However, if the CO requests certain documentation, and the employer ostensibly complies with the request, the CO must state his or her reasons if the documentation is found to be insufficient. *Fried Rice King Chinese Restaurant*, 1987-INA-518 (Feb. 7, 1989).

In the case at bar, Employer failed – at the rebuttal stage – to submit the documentation specifically required in the NOF, which was a contractor license issued by the State of California. Instead, Employer submitted a business license issued by the City of Irvine. (AF 25). The business license submitted by Employer indicates that the City of Irvine, California, recognized Employer as a person, firm or corporation permitted to engage in, carry on or transact business, trade, calling, profession, exhibition or occupation, described as "Landscape Maintenance" for the period of September 7, 2001 through September 30, 2002. (AF 25). Employer's business license provides evidence indicating that it is an on-going business, in compliance with 20 C.F.R. § 656.3.

The regulations do not require that an employer have a state issued contractor's license.[3]

[3]State laws may require certain employers to have a contractor's license, however the NOF does not address this issue. Furthermore, the record does not contain evidence that Employer is a contractor, as the tax return for 2000 states that Employer paid $1,912 in payroll tax. (AF 20).

Although the CO specifically requested a state issued contractor's license, the CO provided no reasoning in the final determination why the business license was insufficient evidence to establish that Employer is an on-going business. *See Fried Rice King Chinese Restaurant*, 1987-INA-518 (Feb. 7, 1989) (holding that the CO must state his or her reasons for not accepting documentation that ostensibly complies with information that the CO requested). Therefore, the CO's determination that Employer has not established that it is an on-going business is rejected by this Panel, because the CO provided no reason why the Employer's business license failed to establish that it is an on-going business.

B. Whether Employer has the Financial Ability to Pay the Proffered Wage

An application for labor certification must clearly show that the employer has enough funds available to pay the wage or salary offered to the alien. 20 C.F.R. § 656.20(c)(1). Certification may be denied where the submission of documentation contradicts the employer's claim of sufficient funds. *See White Harvest Mission*, 1990-INA-195 (Apr. 9, 1991) (denying certification where the employer's tax returns and statements of proposed financial arrangements showed gross receipts insufficient to pay the alien's salary).

In this case, the CO determined that the tax returns submitted by Employer for the year 2000 were insufficient to clearly establish that Employer had sufficient funds to pay the wage offered to the Alien. (AF 6). The Employer argued in its *Statement of Position* that "the fact that the business is actually paying the wage is illustrative of the fact of the ability to pay a salary, " and that taxable income is irrelevant to the financial condition of a business as "tax avoidance" within the bounds of the law is the ultimate goal of a business when filing tax returns. *Employer's Statement of Position*, at 2.

The Employer's 2000 tax return states that the business grossed $45,097.00 in 2000. (AF 19). The tax return also states that Employer paid wages in the amount of $16,625.00. The 2000 tax return also shows numerous other business expenses which were also subtracted from the gross income, in the amount of $5,681.00. (AF 19-20). The tax return shows that Employer had a profit

in 2000 in the amount of $18,362.00. (AF 19).

Employer's argument that the 2000 tax return shows that Employer can afford the wages offered to the Alien is incorrect. *See Employer's Statement of Position*, at 2. Employer contends that because it has established through the tax return that it paid $16,625.00 in wages for 2000, it has illustrated that it can pay the wage offered. However, Employer offered no supporting documentation that the wages paid in 2000 were paid to the person holding the position that Employer attempted to fill through this application for alien labor certification. Furthermore, the instant job offer stated that Employer had two positions available (AF 81-82), which would result in a total yearly salary for the two positions of $43,347.20. The total wages offered by Employer ($43,347.20) in addition to the business expenses listed on the 2000 tax return ($5,681.00) exceed the gross income of the Employer ($45,097.00). (AF 19).

Employer's argument, that the CO should have considered more than the "taxable income" because employers engage in "tax avoidance" by listing all legitimate expenses possible in order to show little or no profit, is not helpful because Employer provided no alternative proof of ability to pay. *See* 20 C.F.R. § 656.20(c)(1) (stating that an employer has the burden of *clearly* establishing that it can afford to pay the wage offered to the alien) (emphasis added). Thus, it was reasonable for the CO to rely on the federal income tax returns in determining whether Employer could afford to pay the wage offered, and the denial of the labor certification by the CO is affirmed on that ground.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of
the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.